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No. 87-2100

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

vs.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

BRIEF OF RESPONDENT GROUP W CABLE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL LESCH
SHEA & GOULD
Attorneys for Respondent Group W Cable, Inc.
1251 Avenue of Americas
New York, New York 10020
(212) 827-3000

QUESTIONS PRESENTED

1. The Petition raises precisely the same question recently decided by this Court in Hewitt v. Helms, 107 S.Ct. 2672, 2674 (1987), namely:

> This case presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of [her] claims can nonetheless be a "prevailing party" for purposes of an award of attorneys' fees.

2. Alternatively, the Petition raises the question whether Petitioner stated and proved a claim under 42 U.S.C. § 1983 for deprivation of her right to just compensation (thereby entitling her to an award of attorneys' fees under 42 U.S.C. § 1988) when Petitioner has never applied for nor been denied just compensation, as required pursuant to this Court's decision in Williamson County Regional

Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

3. In the event that this Court construes 42 U.S.C. § 1988 to entitle Petitioner to an award of attorneys' fees in this case, the Petition raises the question whether this construction of 42 U.S.C. § 1988 would compel a forfeiture of Respondent's property without due process of law when Respondent has been found entirely innocent of any wrongdoing and Respondent's property has not been involved in any wrongful activity.

RULE 28.1 LIST

Respondent Group W Cable, Inc. ("Group W") is now known as ARP Cable, Inc. and is owned by a consortium consisting of the following five members, no one of which owns a controlling share: American Television and Communi-

cations Corporation; Century Southwest Cable Television, Inc.; Comcast Corporation; Daniels & Associates, Inc.; and Tele-Communications, Inc. Cable TV General, Inc., is a less-than-wholly-owned subsidiary of ARP Cable, Inc.

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STATUTES INVOLVED

In addition to 42 U.S.C. § 1988 (quoted in the Petition at page 9), this case involves the following statutes:

Section 828(1)(b) of the New York Executive Law (McKinney's 1982), which provides:

> No landlord shall . . . demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance,

> regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Introduction

Petitioner Jean Loretto asserts that she is a "prevailing party" entitled to attorneys' fees under 42 U.S.C. § 1988 even though final judgment has been entered dismissing Petitioner's complaint. The Petition arises from Petitioner's unsuccessful constitutional challenge to Section 828 of the New York

Executive Law, which authorizes a cable television ("CATV") company to install CATV equipment on a landlord's premises and permits a landlord to receive compensation for such installation.

Petitioner makes her claim for attorneys' fees notwithstanding that Respondent Group W, successor-in-interest to original defendants Teleprompter Manhattan CATV Corp. and Teleprompter Corporation ("Teleprompter"), prevailed on one of its alternative defenses to Petitioner's claims after this Court ruled that Section 828 of the New York Executive Law effected a taking that entitled Petitioner to just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). On remand, the New York courts affirmed the judgment dismissing the complaint on the ground that Section 828 and the regulations of the New York State Commission

on Cable Television (the "Commission") provide Petitioner with a reasonable means to obtain just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143 (1983). Petitioner had that right to compensation prior to commencement of this litigation but, to this day, never has applied for an award of compensation. Petitioner therefore has never been denied just compensation, nor has she obtained any benefit as a result of this litigation.

Accordingly, under principles that have been well-established by this Court, Petitioner neither is a "prevailing party" within the meaning of 42 U.S.C. § 1988 (infra, pp. 27-34), nor has she ever stated and proved a claim for the deprivation of a federal right under 42 U.S.C. § 1983 (infra, pp. 34-38). Moreover, an award of attorneys' fees in these circumstances would

constitute a forfeiture of Group W's property and would deny Group W due process of law (infra, pp. 38-42). Finally, Petitioner has shown no reason why certiorari should be granted herein (infra, pp. 42-46).

B. Background

In 1972, the New York Legislature enacted Article 28 of the Executive Law (§§ 811-831), which concerns the regulation of CATV services in New York. Executive Law § 814 created the Commission, and Executive Law § 828 provides for the regulation of relationships among CATV companies, landlords and tenants, including a provision allowing CATV companies to obtain access to a landlord's building subject to the payment of a reasonable fee that is to be determined by the Commission. Section 828(1)(b) thus provides:

> No landlord shall . . . demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

Acting pursuant to Article 28 of the Executive Law, the Commission adopted rules and regulations concerning landlord applications for fees under Section 828(1)(b). On January 15, 1976, the Commission issued a Statement of General Policy which clearly demonstrated that landlords who applied to the Commission for a reasonable fee pursuant to Section 828(1)(b) would in fact receive an award of just compensation. The Commission stated:

> the likely purpose of [Executive Law § 828(1)(b)] was to assure that Section 828 did not subject landlords to potentially unconstitutional takings of their property without just compensation. . . . [W]e shall

> construe the reasonable fee provision of Section 828 of the Executive Law to assure that a landlord is not deprived, by reason of a cable television company's assertion of its Section 828 rights, of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him.

In its Statement of General Policy, the Commission also determined that, in view of the "negligible unoccupied space" used by a CATV installation, "the value of the subject easement is nominal" and that landlords would be entitled to only a nominal fee "in the absence of a special showing of greater damages attributable to the taking." On August 27, 1976, the Commission issued a Clarification of General Policy which established that the "reasonable fee" to be awarded to landlords under Section 828(1)(b) would be $1.00 "absent a special showing of greater damages attributable to the taking."

C. Prior Proceedings In This Lawsuit

Petitioner never applied for an award of the reasonable fee to which she was entitled pursuant to Executive Law § 828(1)(b). Rather, claiming that landlords were aggrieved by Section 828 and the actions of the Commission thereunder, Petitioner commenced this action as a putative class action in the New York Supreme Court, alleging that Teleprompter had committed trespass by placing CATV components on landlords' premises. Teleprompter moved for summary judgment seeking dismissal of the complaint in Special Term of the New York Supreme Court on grounds that, inter alia, (i) Executive Law § 828, which authorized the installation of CATV components on Petitioner's property, was a valid exercise of the State's police power and did not effect a taking ("Argument No. 1"); and (ii)

alternatively, if Section 828 did effect a taking, the statute was valid because state law and Commission regulations provided Petitioner a reasonable means for obtaining just compensation ("Argument No. 2").

Special Term upheld Teleprompter's Argument No. 1 by finding that Section 828 did not effect a taking, but rather represented "a reasonable and, therefore, justifiable exercise of the police power." Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc.2d 944, 945 (Sup. Ct. New York Co. 1979). The Court thus did not find it necessary to address Teleprompter's alternative contention (Argument No. 2) that the complaint should be dismissed because state law provided landlords a reasonable means to obtain just compensation. Special Term's decision was affirmed by the Appellate Division and by the Court of

Appeals, which each found it unnecessary to address Teleprompter's alternative argument for dismissal of the Complaint. See Loretto v. Teleprompter Manhattan CATV Corp., 73 A.D.2d 849 (1st Dept. 1979), aff'd, 53 N.Y.2d 124 (1981).

Petitioner then appealed to this Court, which considered only the taking issue. Based on its holding that Section 828 effected a taking (rejecting Teleprompter's Argument No. 1), this Court reversed and remanded the case to the Court of Appeals for further proceedings. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Although this Court found that Section 828 effected a taking, the Court did not reach Teleprompter's Argument No. 2 -- not yet decided by the New York courts -- that state law provided Petitioner with a reasonable means of obtaining just compensation. Indeed, this Court

expressly stated that the "issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand." 458 U.S. at 441.

In such posture, the case returned to the Court of Appeals, which was directly confronted with Teleprompter's Argument No. 2. In its decision on remand, the Court of Appeals agreed with Teleprompter's Argument No. 2 and held that the statutory framework provided Petitioner a reasonable means for obtaining just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 149-52 (1983). The Court also specifically found that Teleprompter's actions under Section 828 were taken "in good faith under a statutory license." Id. at 153. Teleprompter was not found guilty of any wrongdoing, and the Court expressly upheld

the validity of Executive Law § 828. Id. at 147, 154. The only suggestion that Petitioner may have "prevailed" in this action arises from the Court of Appeals' holding that Commission Regulation 598.3 was invalid because it may have barred a landlord's compensation claim before receipt of notice of the right to compensation. Id. at 154. Nowhere did the Court of Appeals even suggest that Teleprompter had acted improperly; the Court merely held that the Commission had promulgated an invalid regulation -- a claim that the Court of Appeals held had not been properly raised by Petitioner in this lawsuit.[1]

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[1] Petitioner did not raise the notice issue until the case reached the Court of Appeals on remand -- after this Court's decision on the taking issue. As soon as Petitioner raised the notice issue, (a) Teleprompter promptly and voluntarily waived the bar of Regulation 598.3 with respect to any landlord who had not received actual notice of the right to a hearing, and (b) the New York Attorney General advised the Court of Appeals

(footnote continued)

After the decision of the Court of Appeals on remand, the case was remitted to the Supreme Court, New York County. In an Order and Judgment on Remittitur dated July 11, 1983, Special Term's earlier judgment dismissing Petitioner's complaint was decreed to remain "in full force and effect" except for modifications (i) declaring Regulation 598.3 to be invalid, (ii) permitting Petitioner to apply to the Commission for payment of "just compensation," and (iii) permitting Petitioner to proceed with her individual action in trespass, "if she be so advised," for the period prior to the enactment of Section 828. Petitioner has taken no steps in furtherance of any of these claims.

(footnote continued from previous page)
that the Commission would immediately repeal Regulation 598.3 if Section 828 were otherwise valid. The Court of Appeals therefore found that "the notice problem is not properly before us . . . but in any event appears from the stipulated facts no longer to present a problem" (58 N.Y.2d at 154).

D. Results Of This Lawsuit

The Commission thereafter amended its regulations to clarify that landlords were entitled to make application for "just compensation," rather than a "reasonable fee," for the placement of CATV components on their property. Petitioner never has applied for a payment of compensation either prior to or after this Court's decision -- and Petitioner accordingly has never been denied just compensation for the taking effected by Section 828. Thus, despite twelve long years of litigation, Petitioner has achieved no tangible benefit whatever as a result of this lawsuit -- an outcome that was predicted in Justice Blackman's dissenting opinion when he stated that "[i]f, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the

net result will have been a large expenditure of judicial resources on a constitutional claim of little moment." 458 U.S. at 456, fn. 12.

Petitioner nevertheless suggests to this Court (Petition, p. 14, fn) that she may have achieved a benefit for landlords because the Commission recently granted two other landlords compensation awards from two other CATV companies of "$150 and $400 -- amounts approximating the amounts [Petitioner] had sought for individual owners."[2] Although Petitioner indicates that the Commission made such awards for a "temporary excessive taking," Petitioner ne-

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[2] The two decisions referred to by Petitioner concedely were issued in April, 1988 and thus were not part of the record below and are not properly before this Court. Moreover, Group W was not a party to either of those proceedings, which are in no way binding upon it. In the Commission's two compensation proceedings where Group W has been a party, the Commission granted nominal awards of $1.00 each.

glects to inform this Court that the Commission had full authority to make such awards prior to this litigation. Indeed, as shown at page 13 above, six years before this Court's decision in this case the Commission established that a $1.00 nominal fee award applied only "absent a special showing of greater damages attributable to the taking."

In any event, Petitioner concedes that the Commission's recent compensation decisions support the decision that Petitioner seeks to reverse because "[t]he successful applications of [other landlords] would merely reinforce the Appellate Division's belief that [Section 828] provides a sufficient remedy for obtaining just compensation and, therefore, Plaintiff has not been deprived of any constitutional right" (Petition, p. 16 fn.).

E. Petitioner's Motion For An Award of Attorneys' Fees And The Decisions Below.

In early 1985, Petitioner submitted a motion to Special Term requesting an award of attorneys' fees and costs. As relevant herein, Petitioner asserted that, although not pleaded as such, this action stated a claim under 42 U.S.C. § 1983 and that she was a "prevailing party" who was entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. Special Term held that Petitioner was a prevailing party entitled to attorneys' fees (A-37), but nevertheless denied Petitioner's fee application as "premature" because Petitioner had not received any award of just compensation and thus the Court was unable "to evaluate the true impact of plaintiff's actions and the efforts thereby [sic] of her counsel" (A-42).

On appeal, the Appellate Division affirmed Special Term's decision without opinion (A-21). Upon reargument, the Appellate Division issued an opinion holding that Petitioner was not a "prevailing party" entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. The Court stated (A-9 to A-12):

> To state a claim as a "prevailing party" for attorneys' fees under 42 USC § 1988 plaintiff who relies upon 42 USC § 1983 must first demonstrate that she has been deprived of a federal right under color of state law . . . . . It ought to be clear that plaintiff cannot now establish the deprivation of any federal right . . . . Plaintiff has not shown that her property has been taken without just compensation or due process, and, thus has not demonstrated that the taking which was itself authorized pursuant to a decidedly unobjectionable exercise of the state's police power (458 US 419, 425-426) was effected in a manner violative of her federal rights. As the U.S. Supreme Court has recently observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes

taking without just compensation (citations omitted)". (Williamson Planning Commission v. Hamilton Bank, 473 US 172, 194 [1985]). . . . Until plaintiff applies for just compensation, utilizing the procedures therefor set forth in the Executive Law and regulations promulgated pursuant thereto, and is denied the compensation she seeks she is not in a position to allege sufficiently, much less prove, the denial of any federal statutory constitutional right. The Supreme Court has observed quite pointedly: "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." (emphasis in original). (Id. at 194 n. 13; see also Id. 194-195).

The conclusion which follows is that plaintiff, who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law § 828 in 1972, cannot now make a § 1983 claim. If she cannot make a § 1983 claim, neither may she seek attorneys' fees as a "pre-

vailing party" pursuant to 42 USC § 1988.

The Court of Appeals denied Petitioner leave to appeal from the order of the Appellate Division (A-84), and Petitioner thereafter served her Petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Group W respectfully submits that the Petition should be denied because it is clear that Petitioner is not entitled to attorneys' fees as against Group W for at least the following reasons: (a) Petitioner is not the "prevailing party (infra, pp. 27-34); (b) Petitioner has failed to ever state and prove a claim under 42 U.S.C. § 1983 (infra, pp. 34-38); and (c) an award of attorneys' fees against an innocent party such as Group W would compel a forfeiture without due process of law (infra, pp.

38-42). In addition, Petitioner has not demonstrated any basis for granting certiorari in this case (infra, pp. 42-46).

A. Petitioner Is Not A Prevailing Party Herein.

As shown above (pp. 14-19), Petitioner clearly is not a prevailing party herein. Petitioner obtained no relief against Group W and the Court of Appeals held that Teleprompter had "proceeded in good faith under a statutory license" (58 N.Y.2d at 153). Although this Court rejected Group W's Argument No. 1 that Section 828 of the Executive Law did not effect a taking, the Court of Appeals ultimately affirmed the judgment dismissing Petitioner's complaint on the basis of Argument No. 2, i.e., that Section 828 provided Petitioner a reasonable means of obtaining just compensation. Thus, the only hint of success

that Petitioner achieved in this lawsuit was the invalidation of one regulation containing a minor defect that defendants stipulated to cure as soon as it was brought to their attention (see p. 18 fn. 1, supra).

In such circumstances, this Court has made clear that Group W may not be held liable for Petitioner's attorneys' fees when Group W was not the "losing party" and has not been held liable in any manner to Petitioner. Indeed, this Court recently decided the same issue raised by Petitioner in Hewitt v. Helms, 107 S.Ct. 2672 (1987). In Hewitt, this Court held that a plaintiff was not entitled to attorneys' fees under 42 U.S.C. § 1988 where, as here, the complaint was ultimately dismissed on the merits -- even though, as here, plaintiff had achieved some interlocutory

success. This Court stated (id. at 2675):

> Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. See Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). Helms obtained no relief. . . . The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.

Similarly, Petitioner cannot credibly claim that she has prevailed on the merits when judgment has been entered dismissing her complaint, even though Petitioner received an interlocutory ruling that Executive Law § 828 effected a taking that required the payment of just compensation. The New York Court of Appeals affirmed the dismissal of the complaint based on Group W's alternative Argument No. 2 that state law and Commission regulations provided Petitioner

a reasonable means for obtaining just compensation for the taking. Had the New York courts reversed the arbitrary order in which they addressed the issues presented in this case by dismissing the complaint based upon Argument No. 2 in the first instance and without deciding the taking issue, Petitioner never would have achieved the "success" that she claims from this Court's earlier Loretto decision. In Hewitt v. Helms, 107 S.Ct at 2676-77, this Court made clear that a favorable decision with respect to an issue that ultimately is irrelevant to the merits does not entitle a party to an award of attorneys' fees as a prevailing party:

> These would be no conceivable claim that the plaintiff had "prevailed," for instance, if the District Court in this case had first decided the question of [the alternative defense]. . . . There is no warrant for having status as a "prevailing party" depend upon the essentially arbitrary or-

> der in which District Courts or Courts of Appeals choose to address issues.

Moreover, this litigation -- and particularly this Court's earlier decision in this case -- has not affected Group W's conduct with respect to Petitioner (or other landlords) in any manner. Group W still has the right to install its CATV equipment upon a landlord's property pursuant to Executive Law § 828, whose constitutionality was upheld in all respects by the Court of Appeals. 58 N.Y.2d at 154. Petitioner has not even applied to the Commission for the compensation to which she has always been entitled under Executive Law § 828, much less has she or any other landlord obtained an award from Group W that is in excess of the award that the Commission would have granted in the absence of this litigation.

In Hewitt v. Helms, 107 S.Ct. at 2676, this Court also made clear that a plaintiff's failure to obtain any redress from a defendant precludes an award of attorneys' fees under 42 U.S.C. § 1988:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces -- the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. . . . The real value of the judicial pronouncement . . . is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff (emphasis in original).

This Court accordingly concluded that plaintiff in Hewitt was not a prevailing party because the "only 'relief' he received was the satisfaction of knowing that a federal court concluded that his rights had been violated." Id. Peti-

tioner, however, has not even achieved that degree of "moral satisfaction." No court has ever concluded that Petitioner's rights have been violated, and Petitioner has not been denied just compensation for the taking because she has never applied for such an award. Petitioner therefore has no basis for claiming to be the "prevailing party" herein.

Finally, this Court's decision in Kentucky v. Graham, 473 U.S. 159 (1985), confirms that Petitioner is not entitled to attorneys' fees against Group W. This Court clearly held that fee liability does not attach against an innocent party such as Group W (id. at 165, 168):

> [L]iability on the merits and responsibility for fees go hand in hand. Where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not autho-

> rize a fee award against that defendant. . . .
>
> * * *
>
> . . . . Section 1988 simply does not create fee liability where merits liability is non-existent.

Petitioner has not established that Group W has any liability to her, on the merits or otherwise, as a result of this litigation. Under at least two recent decisions of this Court, Petitioner therefore is not entitled to a fee award as a "prevailing party" under 42 U.S.C. § 1988, and the Petition for a writ of certiorari accordingly should be denied.

B. Petitioner Neither Stated Nor Proved A Claim Under 42 U.S.C. § 1983 For Deprivation Of A Federal Right Because Petitioner Never Applied For, And Has Never Been Denied, Just Compensation.

Under this Court's decision in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), Petitioner's claim that Teleprompter's

installation of CATV equipment on her premises constitutes a taking without just compensation does not state a claim under 42 U.S.C. § 1983 unless Petitioner also alleges and proves that she has no method to obtain just compensation under state law. Here Petitioner can neither allege nor prove the lack of such remedy because the Court of Appeals held that Executive Law § 828 provides Petitioner with a reasonable means to obtain just compensation for the taking of her property (58 N.Y.2d at 149-52). Petitioner accordingly has no claim under 42 U.S.C. § 1983 and no claim for an award of attorneys' fees under 42 U.S.C. § 1988.

Petitioner's contention that she "clearly had no administrative or judicial remedy for obtaining just compensation prior to this Court's decision" (Petition, p. 29) ignores the fact that

Section 828's "reasonable fee" provision and the Commission's procedures promulgated thereunder were in existence prior to commencement of this litigation. As discussed above (supra, pp. 12-13), the Commission's January 15, 1976 Statement of General Policy clearly established that reasonable fee awards granted pursuant to Section 828 would "assure that a landlord is not deprived . . . of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him." Moreover, the Court of Appeals confirmed that the Commission's procedures would ensure an award of just compensation under Section 828 (58 N.Y.2d at 149-50).

This Court made clear in Williamson County that "no constitutional violation occurs until just compensation has been denied" and that the "nature of the

constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action" (473 U.S. at 194, fn. 13, emphasis added). The Court explained (473 U.S. at 194-95):

> If the Government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." . . . Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.
>
> . . . [A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. . . . (emphasis added).

In short, under Williamson County Petitioner has no claim under 42 U.S.C.

§ 1983 (and therefore is not entitled to an award of attorneys' fees under 42 U.S.C. § 1988) because Petitioner never made any attempt to obtain just compensation by applying to the Commission. The Commission's Statement on General Policy (supra, p. 12-13) and the Court of Appeals' decisions both before and after this Court's decision (supra, pp. 15-18) confirm that if Petitioner had made such an application, she would have been awarded just compensation. Having failed ever to make an application to the Commission, Petitioner could not prosecute an action under 42 U.S.C. § 1983.

C. An Award of Attorneys' Fees Against Group W Would Violate The Due Process Clause Of The United States Constitution.

The Court of Appeals has held that Teleprompter performed its CATV installations "in good faith under a statutory

license" (58 N.Y.2d at 153), and judgment has been entered herein dismissing Petitioner's complaint. Accordingly, Group W has been held to be entirely innocent of any wrongdoing towards Petitioner, and an award of attorneys' fees against Group W in these circumstances would constitute a forfeiture of its property without due process of law in violation of the United States Constitution.

It is a fundamental principle of our society that no person shall be deprived of property without "due process of law." U.S. Const. amend. V and XIV, § 1. In this case, an award of attorneys' fees against Group W would work a forfeiture of its property in circumstances where Group W has been found innocent of any wrongdoing and where Group W and its property were not involved in any illegal conduct. Such a

forfeiture would deprive Group W of its property without due process of law.

Although the property of an innocent party may be subject to forfeiture if the property is used in illicit activity pursuant to the fiction that the property is guilty of facilitating crime (see Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931)), this Court has recognized that "it would be difficult to reject the constitutional claim of an owner whose property [was] subject to forfeiture . . . [and who] proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689, reh'g denied, 417 U.S. 977 (1974) (emphasis added). Several courts have

that such a forfeiture would violate due process. See United States v. One Tintoretto Painting, 691 F.2d. 603, 608 (2d Cir. 1982) ("forfeiture would simply be an arbitrary act, serving no legitimate government interest, oppressive and harsh, and in our view contrary to the Fifth Amendment"); Edelberg v. Illinois Racing Board, 540 F.2d 279, 283 (7th Cir. 1976) ("Clearly the due process clause of the Fourteenth Amendment protects against unreasonable and arbitrary state deprivation which imposes forfeitures, punishments or costs").

Group W's claim of a constitutional deprivation of property arising from an award of attorneys' fees herein presents a strong case of a due process violation. Not only is there a complete absence of proof of any wrongful activity, but the courts also have found that there has been no "proscribed use of

property" that forms the necessary predicate for a legal forfeiture.

This Court therefore should deny the Petition for a writ of certiorari.

D. Petitioner Has Not Shown Any Reason For Granting Certiorari.

We have shown above (pp. 27 to 42) that Petitioner has no basis for an award of attorneys' fees in this case. Petitioner nevertheless contends that this case merits the Court's attention for three reasons: (1) the alleged "chilling effect" of the decision below upon resort to the courts for vindication of constitutional rights (Petition, pp. 22-26); (2) this case may constitute a vehicle for defining a "Section 1983 cause of action" and a "prevailing party" under 42 U.S.C. § 1988 (Petition, pp. 26-37); and (3) this case will allow this Court to determine whether attorneys' fees may be awarded at an interim

stage of a litigation (Petition, pp. 38-43). None of Petitioner's rationales are persuasive.

Petitioner raises the spectre that the decision below will somehow discourage the bringing of meritorious claims for the vindication of constitutional rights (Petition, pp. 22-26). However, as shown above (pp. 27-34), and as established by this Court in Hewitt v. Helms, 107 S.Ct. 2672 (1987), a prerequisite of an attorneys' fee award under 42 U.S.C. § 1988 is a meritorious claim. But Petitioner's claims herein were not, in fact, meritorious because her complaint has been dismissed and Petitioner has obtained absolutely no redress, much less damages in excess of the "reasonable fee" to which she was entitled prior to commencement of this litigation (supra, pp. 19-22). The decision below therefore will have no

"chilling effect" upon the bringing of meritorious claims for the vindication of constitutional rights.

This Court's recent decisions in Hewitt v. Helms, 107 S.Ct. 2672 (1987), Kentucky v. Graham, 473 U.S. 159 (1985), and Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), also negate any need for this Court to again address the concepts of a "Section 1983 cause of action" and a "prevailing party" under 42 U.S.C. § 1988. Petitioner has raised no uncertainties or ambiguities in the aforementioned opinions that make it appropriate for this Court to revisit these recent decisions. Moreover, to the extent that Petitioner suggests that the Courts of Appeals may be in conflict on such issues (Petition, pp. 36-37), this Court's recent opinions provide the courts with authoritative guidance.

Finally, Petitioner asks this Court to address the issue of whether attorneys' fees should be awarded on an interim basis even as Petitioner acknowledges that this Court has held that an interim fee award should not be made where, or here, "plaintiff had not yet established liability" (Petition, p. 39, citing Hanrahan v. Hampton, 446 U.S. 754, reh'g denied, 448 U.S. 913 (1980)). Moreover, Petitioner relies upon Bradley v. Richmond School Board, 416 U.S. 696, 723 (1974), for the proposition that fees are "awardable on an interim basis when the plaintiff has achieved substantial success on the merits, such as by establishing liability . . . ." (Petition, p. 39). However, as shown above (pp. 27-34), Petitioner has never achieved the "substantial success on the merits" or established any "liability"

that might entitle her to an interim fee award.

Petitioner accordingly has demonstrated no reason why this Court should grant certiorari in this case.

CONCLUSION

For the above reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael Lesch
Shea & Gould
Attorney for Respondent
Group W Cable, Inc.
1251 Avenue of the Americas
New York, New York 10020
212-827-3000

Of Counsel:

John G. Nicolich